



## World Leader in Breath Alcohol Testing for Over Fifty Years

June 27, 2003

Docket Management Facility

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(USCG—2001—8773)

U.S. Department of Transportation

Room PL—401

400 Seventh Street SW

Washington, DC 20590-0001

To Whom It May Concern:

This letter is to provide comments to the Notice of Proposed Rulemaking published in the Federal Register on February 28, 2003 by the USCG regarding alcohol testing following Serious Marine Incidents. Intoximeters is a leading manufacturer of alcohol testing equipment and supplies as well as a provider of training courses and materials for both DOT and non-DOT employers. As a company, we have extensive experience in helping to develop alcohol-testing programs for employers (including maritime employers), law enforcement agencies, health care providers and military agencies.

1. **Reliability of Results vs. Cost.** The present value of 10-year costs for 180,819 vessels to purchase ASDs was estimated in the NPRM as \$144M. Screening systems (including breath ASDs) inherently supply approximate results. Some are not specific for alcohol (i.e., read acetone as alcohol). In short, they do not supply evidence that can be supported under any legal scrutiny, as they do not insure the quality or analysis of the sample collected. Using ASDs will indicate only the *possible presence* of alcohol in a person's system and will not quantify the BAC level with any degree of reliability. A screening test result is not sufficient to stand up in a court of law or administrative proceeding, calling into question any possible license revocation action against a mariner, or adverse personnel action by the employer. The USCG and marine employers could be subject to substantial additional costs trying to defend the results of an ASD test. It does not seem reasonable to spend \$144M and not have reliable data.

Given the number of vessels to be impacted by the regulation, equipment manufacturers would anticipate a period of high demand, allowing them to establish reduced pricing to a particular market segment for a period of time. This would have the effect of making evidential equipment available at a price competitive with screening systems. An analysis of lower priced NHTSA-approved evidential devices indicates a price range between \$450 and \$700, including mouthpieces, training and calibration equipment.

By way of comparison, a rough estimate of the present value of 10-year costs for 180,819 vessels to purchase evidential grade equipment, with proper training and calibration

8110 Lackland Road • Saint Louis, Missouri 63114

Phone: 314-429-4000 • FAX: 314-429-4170

<http://www.intox.com>

equipment, will be approximately \$286M. Using EBTs will assure reliable, defensible, quantitative BAC results. There would be no guessing or interpretation required.

Requiring an alcohol testing program without having a consistent and scientifically recognized standard for the instruments used is essentially unfair to the employee, risky for the employer, and undermines a system that has been successfully used on ocean-going vessels for many years. When taking into consideration the liabilities and possible litigation costs that may arise as a result of allowing the use of ASDs, we believe that the use of a low priced evidential system will provide the most sound and responsible alcohol testing program for the marine industry.

2. **Protection of the Marine Employer.** Neither the current 46 CFR Part 4 nor the proposed rule provides any guidance regarding the responsibilities of the marine employer in the event of a positive alcohol test result. Nor can we find this addressed in 33 CFR Part 95 or 46 CFR Part 16. What does the marine employer do with a person who tests positive for the presence of alcohol? This has not been a problem with the ocean-going vessels as those employers typically have written policies in place to guide their activities. Small employers should be provided with some regulatory direction. The NPRM states that if the individual refuses to provide a sample (blood, breath, saliva, urine) the marine employer is to remove the individual from duties affecting the safe operation of the vessel. However, there is no provision in the current or proposed rule indicating what constitutes a “positive” alcohol test, nor is there a provision requiring an individual who tests positive to be removed from duty. Positive could mean anywhere from a barely noticeable BAC of .010 to a near comatose reading of .400 BAC. This lack of instruction in the rule certainly appears to present a major safety and liability issue for the marine employer.
3. **Performance Standards for Testing Devices.** The Draft Regulatory Analysis for this NPRM specified that the alcohol testing devices to be used would be on the National Highway Traffic Safety Administration (NHTSA) Conforming Products Lists, but the NPRM does not mention this. To be clear, the final rule should specifically require the devices to be listed on one of the NHTSA CPLs.
4. **Training Issues.** Training for evidential instruments is not much more complicated than for screeners. At a minimum, training on any device (ASD or EBT) should include hands-on performance of mock collections using the instrument or device that will be used during a live collection. The cost burden analysis in the NPRM assumes that only ½ hour will be necessary to train on saliva ASDs and 1 hour for breath ASDs. We believe that both of these time estimates are low by approximately ½ hour. The most cost effective way for professional training organizations to provide training is in a group setting. With 10-12 people in a group, 1 hour is not sufficient time to insure all students have an adequate understanding of instrument operation, much less any instruction on routine quality assurance procedures. Videos or computer based training CD-ROMs provided for pre-class study will help, but one hour is still probably a low estimate for a hands-on training session.

### Summary

The two stated benefits of the rule are: “serve as additional deterrents from crewmembers using alcohol...”, and “provide more accurate information relating to the role alcohol and illegal drugs play in SMIs”. The NPRM, as written, will not accomplish either of these stated goals. The use of ASDs will provide information relative to the possible presence of alcohol. Without reliable BAC data it will not be possible to determine the role alcohol plays in SMIs, and without any stated actions to be taken against violators there will be no deterrent effect.

The proposed regulation will emasculate the existing safety enforcement program for ocean going commercial vessels. The equipment to be used (i.e., screeners) will have no evidential value, there are no penalties for alcohol abuse as no prohibited levels are defined, and training of operators is non-descript and thus will be inadequate in the long run. Therefore, while the proposed regulation may serve some Coast Guard purposes, it does not serve the public in any meaningful way.

While the cost is more, the only true economic benefit to society comes from a supportable evidential program. Perhaps instead of expanding the requirement to all commercial vessels, just the 80,819 documented vessels should be included first, thus lowering the initial cost impact to the industry and providing a period of time for the program to be evaluated in practice. Alternatively, to alleviate some of the burden of compliance, the Coast Guard could consider allowing marine employers to utilize third party testing services if the vessel is able to dock within the two-hour time frame. Allowing these operators to contract with a professional collection service would relieve much of the expense of the regulation for smaller entities. It appears from proposed section 4.06-15[b] that the Coast Guard will allow marine employers to use third party testing services to collect urine drug screens. Most facilities that perform urine drug screen collections also provide alcohol-testing services. **We would definitely not recommend that marine employers be allowed to wait any longer than two hours to obtain alcohol testing from a third party.**

We respectfully request that you consider these comments in your final rulemaking. If you have any questions or would like clarification of any of these points, please do not hesitate to contact us at (314) 429-4000.

Sincerely,

Betye Bailey  
Corporate Trainer